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WHY IS A MASTER LIABLE FOR THE TORT OF HIS SERVANT?

THE principle upon which the law treats one who wrongfully injures another as responsible therefor in damages, is easily accounted for. It bears a close analogy to that reasonable provision which requires that A when he has deprived B of property, shall restore to B the property itself, or its money equivalent. In cases, however, where a defendant is proceeded against because of acts done, or duties neglected, by his servant, the true ground of liability is not so readily capable of ascertainment. Where a servant's act may with perfect propriety be taken to be that of the master himself, the reason is plain enough for casting the latter in damages. But we soon approach a border-line where the conduct of the servant is altogether his own, — the master neither being present, nor, as a matter of fact, countenancing in the slightest degree the act of his servant, — and yet the master is held to a rigid accountability, and made to respond in damages, as for his own fault or neglect. The rule of liability in such cases may be concisely stated as follows: For all acts done in the execution of the master's business, within the scope of the servant's employment, and resulting in the infliction of injury, the master is responsible.

It is the design of this article very briefly to inquire into the reasons why this rule, which is now so firmly entrenched in the law, was originally formulated. Our purpose is to explore, and, if it may be, to discover upon precisely what principle the rule is grounded. Of course, it is conceivable that a rule may work well in practice, and yet that when traced to its origin, it will be found to rest upon no logical foundation. It is seldom unprofitable to keep steadily in mind the reason of a rule, in order that, if for nothing else, we may at least make sure that the rule itself, whatever may be its justification, shall not under new conditions be extended beyond just and salutary limits.

The profession is well aware to what extent the present generation of lawyers is indebted to the labors of O. W. Holmes, Jr. (now Mr. Justice Holmes, of the Massachusetts bench), in tracing

legal rules and forms of actions to their origin, and thus throwing needed light upon the law as to-day administered. In the opening chapter of "The Common Law" (Boston, 1881), that learned and acute writer tells us of the growth of the doctrine of master and servant; of the pecuniary responsibility assumed by the master for the purpose of securing the surrender to him of the body of his slave, held by an injured party as a *thing* responsible for the injury committed. "The principle introduced on special grounds in a special case, when servants were slaves, is now the general law of this country and England; and under it men daily have to pay large sums for other people's acts, in which they had no part, and for which they are in no sense to blame" (page 16).

It may be permitted to us to remark how refreshing it has proved after our own unaided attempt at ascertaining by a process of speculative thought why, upon principles of fairness and justice, there should in this class of cases be *imputed* to a master a blame that in reality has no existence, to come across the passage just quoted. Taken with its context, it serves to explain how such a rule has gradually come to be incorporated into what is now the law of England and America. The reason for the maintenance of the rule, if not for its origin, I am fain to believe, however, should be sought for in an entirely different direction.

If a gentleman be negligent in his choice of a servant, or if he keep a servant in his employ whom he knows to be heedless, and an accident occurs, the rule that he should be made to respond in damages needs not to be explained. The present inquiry is restricted to the case where no such neglect can, as a matter of fact, be charged against the master, — to the case, in other words, where negligence is displayed on the part of the servant *for the first time*. Why should the master be held liable?

Let us take a case in concrete form. For this purpose let us select as an illustration the familiar instance of a carriage. You are a man of means, we will suppose, and you have in your employ a coachman. He came to you well recommended, and has for three or four years proved himself faithful to your interests. You justly regard him as an intelligent, sober, and prudent man; and you have never hesitated to intrust to him the safety of your children, or guests. One day, he is driving your carriage to the railroad station to meet you. While on his way he drives over a pedestrian, and severely injures him. The person injured is not to blame; the driver is. *For the first time* your coachman is

careless, and guilty of neglect ; for, by the exercise of proper caution, he might have avoided the casualty.

Your coachman is a frugal man, and has laid up a few hundred dollars in the savings-bank. The injured man's attorney either does not suspect this to be so, or else he rightly conceives that your bank account can much better stand a strain upon it, and you are confronted by a suit. Now, upon what ground of justice and fairness ought you to be compelled to pay damages ?

It is conceded that you are not morally to blame. You did nothing to bring about the occurrence of the accident. You had omitted no duty in respect to it. You owned the carriage and the horses. An ingenious mind prompts the suggestion that it was by your order that the offending driver was at that particular spot at that moment of time. The visible instrument by which the injury was inflicted was yours.

The act was not wilfully done. As will sometimes happen, the man "lost his head," and for his neglect you must pay.

We are told, first, that the coachman at the time was acting in the course of your employment. Had the use of the carriage been given him so that he was driving, not for you, but for his own purposes, you would not have been liable. Being engaged about your business, and for your benefit, you must take the consequences. It is not contended that the master *causes* the servant's action ; but the rule of law is to be maintained that what the servant does here within the scope of his employment is presumed to be done under the master's orders.

Perhaps as comprehensive an exposition of the grounds of this liability as can readily be cited is found in the following language of Lord Cranworth, in a leading case,—language which, according to a late text-writer on the subject, furnishes "a very pointed and excellent illustration of the rule :"—

"If a servant driving his master's carriage along the highway carelessly runs over a bystander, or if a game-keeper, employed to kill game, carelessly fires at a hare so as to shoot a person passing on the ground, or if a workman employed by a builder in building a house negligently throws a stone or a brick from a scaffold, and so hurts a passer-by, — in all these cases (and instances might be multiplied indefinitely) the person injured has a right to treat the wrongful act as the act of the master. *Qui facit per alium, facit per se*. If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible ; and the law does

not permit him to escape liability because the act complained of was not done with his own hand. He is considered as bound to guarantee third persons against all hurt arising from the negligence of himself or of those acting under his orders, or in the course of his business. Third persons cannot, or at all events may not, know whether the particular injury complained of was the act of the master or the act of the servant. A person sustaining injury in any of the modes suggested has a right to say: I was no party to your carriage being driven along the road, to your shooting near the public highway, or to your being engaged in building a house. If you chose to do or cause to be done any of the acts, it is to you, and not to your servants, that I must look for redress, if mischief happens to me as their consequence. A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risk without their consent."¹

An obvious criticism for one to make who is searching for the reason of the rule is, that all this is very well put, but it discloses no *reason*. It goes no deeper than to state what is the law.

To be sure, it does not follow that there is not a reason because Lord Cranworth fails to bring it forward. But a similar disappointment awaits the inquirer, we think, in trying to get at the bottom of other decisions on this subject. Lord Brougham, for example, is reputed as saying in *Duncan v. Findlater*:²—

"I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please; and the *reason* that I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

There is really no causal connection between the order given by the master to drive to the station, and the injury inflicted by the driver's neglect; so that the expression, "set the whole thing in motion," does not help us very far toward a solution of the question. Moreover, to say that what the coachman does is done for the benefit of his employer, is not true, so far as it is meant to apply to the coachman's committing a tort. It is true that the servant is prosecuting a duty in his master's behalf, and that in a sense he represents his master; but the latter has done nothing, nor has he sanctioned the doing of anything, to the injury of the third person.

¹ *Bartonhill Coal Co. v. Reid*, 3 McQ. 266, quoted by Wood, in his "Master and Servant," p. 526.

² 6 Cl. & F. 910.

Charging him with the fault of the servant, therefore, is a purely arbitrary act of the law. It may perhaps find its justification in that refuge to which courts at times have found themselves obliged to resort, namely, public policy and convenience.

Underneath the surface of this expression, "for the master's benefit," there seems to be lurking the thought that whatsoever a servant does with intent to further his master's interest must be considered as if done by the master's previous order; and hence that all results attendant upon the servant's manner of doing it are to be treated precisely as if the master had actually caused those results to be brought about. This is, of course, pure assumption. One may say that it is an assumption laid hold upon in order to support a fancied theory of causal connection between the inanimate instrument that figures in the transaction, and the innocent but unlucky owner who, though corporally absent, is treated as legally present.

A discovery of the true reason why liability is imposed upon the party whom in these cases we term "master" would appear to be left, not to research into the reports of the earlier decisions, but to our insight into human nature, and our perception of the springs of human action. With due deference to the conclusions of others, who from time to time may have sought to work out this problem, we venture to suggest the following solution, that certainly has much in its favor.

The rule may be attributed to the influence that our feelings of sympathy have over us for a fellow-being in distress. We cannot look upon the unfortunate victim of an accident without being sensible, not only of pity for him, but of more or less indignation and resentment against the person whom we take to be the party in fault. A brewery wagon injures a child. The crowd blame the driver. The sight of a name upon the wagon awakens a feeling against the company. In every instance, upon viewing the servant and the work in which he is engaged, the transition is an easy one over to the employer. Though not present to the senses of the beholder, he is readily pictured in imagination, and associated with his servant as deserving of the severest censure.

Following close upon this thought, if not the parent of it, is a vague feeling that the injury must be fully repaired. He who robs a man of his sound limb and good health ought to pay roundly for it. The damage has come through human agency. Some man, or men, must make it good. In a confused way (our feelings

getting the better of our judgment) we reach a conclusion that all that human means can accomplish must be brought to bear to alleviate suffering, — to repair an injury that ought never to have been inflicted. The "master" being more or less connected in our thoughts with the affair, and being moreover a man able to respond with his money, we quickly determine that it is only right that he should assume the responsibility of what we easily call his share in the accident. We see no hardship in making him pay the bills, and we leave him to console himself with the reflection how much better off he is than the poor fellow who has been injured.

Reducing this sentimental process to its standard of logical value, we perceive that, as a judicial reason, it is worthless. Viewing it as an impulse or a conviction to determine how men should treat each other, we find it irresistible.

If this attempt to account for the rule in question shall appear to the reader to be strained and far-fetched, perhaps he may suggest a simpler and more convincing explanation. The employment of servants in this country has grown in every direction with the wonderful development of our resources. Whatever may be the true ground for imposing upon employers this burden of liability, it is well to bear in mind the origin of the rule, that in new cases constantly arising it may be pushed no farther than a sound public policy and a keen sense of impartial justice shall clearly warrant.

Frank W. Hackett.

NOTE. — The reader who is disposed to pursue the inquiry further may consult a chapter on Employers' Liability in Sir Frederick Pollock's "Essays on Jurisprudence and Ethics" (London, 1882), pp. 116, 131; also, two articles on *Agency*, by Mr. Justice Holmes, HARVARD LAW REVIEW, vol. iv. p. 345, and vol. v. p. 1; and the "Reports to the House of Commons of the Select Committee on Employers' Liability for Injuries to their Servants." The reports are printed in the Parliamentary Blue Books for the years 1876 and 1877. Of special application is the testimony of Bramwell, J., Report, 1877, pp. 58, 59, and of Brett, J., pp. 115, 119; also the views of Joseph Brown, Q. C., Report, 1876, pp. 38, 41, 44; and those of R. S. Wright, — now Mr. Justice Wright, — pp. 47, 51.

These references, it is proper to say, were unknown to us while we were putting into shape the suggestions as above presented. The friend who has kindly furnished them takes occasion to remark, pertinently enough, "It would be a real service to the profession to get them to read the testimony in the Blue Books, where judges 'let themselves out' more than in court." Possibly it is not too much to hope that the substantial portions of what at least the justices have said before the committee may be reprinted some day in this country in a form readily accessible to bench and bar.

F. W. H.